91-293

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

SOUTHERN PACIFIC TRANSPORTATION CO., PETITIONER,

v.

JOSE HERNANDEZ, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Norfolk & W. Ry. v. Liepelt*, 444 U.S. 490 (1980), this Court held it was reversible error to refuse to instruct the jury that damages awards were not subject to federal income taxation in an action controlled by federal common law. In this case the trial court refused to instruct the jury on the non-taxability of any award, and the appellate court held this error was harmless. The question presented for this Court's review, upon which the courts of appeal are in conflict, is the following:

Does the *Liepelt* rule apply in all cases controlled by federal common law, or is it only reversible error to refuse the non-taxability instruction where it appears in hindsight from the face of the verdict that the jury improperly inflated its award?

LIST OF PARTIES

All parties who appeared in the Court of Appeals for the Fourth Supreme Judicial District of Texas are listed in the caption. The following entities are either subsidiaries (not wholly owned) or parent companies of Southern Pacific Transportation Co.:

- St. Louis Southwestern Railway Co.
- Sunset Railway Co.
- SPTC Holding, Inc.
- Rio Grande Industries, Inc.
- The Alton & Southern Ry. Co.
- Arkansas & Memphis Railway Bridge and Terminal Company
- Kansas City Terminal Railway Co.
- Southern Il. and Mo. Bridge Co.
- Terminal R.R. Assoc. of St. Louis
- Trailer Train Company
- Central California Traction Company
- The Ogden Union Ry. & Depot. Co.
- Portland Terminal Railroad Co.
- Portland Traction Company

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

No. _____

SOUTHERN PACIFIC TRANSPORTATION CO., PETITIONER,

v.

JOSE HERNANDEZ, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS

Petitioner, Southern Pacific Transportation Co. ("Southern Pacific"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Fourth Supreme Judicial District of Texas, entered in this proceeding on January 16, 1991.

OPINION BELOW

The opinion of the court of appeals (App. A, infra, 1a) is reported at 804 S.W.2d 557. No opinion was issued by the state trial court. The Texas Supreme Court denied

Petitioner's application for writ of error without opinion on May 23, 1991. (App. B, infra, 14a)

JURISDICTION

After timely appeal by Southern Pacific, the judgment of the state court of appeals was signed on January 9, 1991. Southern Pacific's timely motion for rehearing was denied by the court of appeals on March 6, 1991. (App. C, infra, 16a) The Texas Supreme Court denied Southern Pacific's timely application for writ of error on May 23, 1991. This Court's jurisdiction is invoked under 28 U.S.C.A. § 1257(a).

STATUTE INVOLVED

This action was brought under the Federal Employer's Liability Act (FELA), 45 U.S.C.A. § 51 et seq. (App. E, infra, 19a) The proper measure of damages in an FELA action is a question of federal law. *Liepelt*, 444 U.S. at 493.

STATEMENT

Jose Hernandez, the plaintiff in the trial court, sued Southern Pacific on the grounds that injuries he sustained in the course of employment were caused by Southern Pacific's negligence.

At the close of the evidence, Southern Pacific requested that the trial court give the jury the following instruction regarding the effect of income taxes on any recovery by the plaintiff:

> Under the law, any award made to the Plaintiff in this case is not subject to federal or

> state income tax. Therefore, in computing the amount of damages which you may find the Plaintiff is entitled to recover for past or future lost earnings, the Plaintiff is entitled to recover only the net, after-tax income. In other words, Plaintiff is entitled to recover only "take-home pay" which you find he has lost in the past, or will lose in the future.

The trial court refused the tendered instruction, which was drawn verbatim from Instruction No. 6B of the Fifth Circuit District Judges Association, Pattern Jury Instructions (Civil Cases) (1983), and Southern Pacific timely objected to the refusal. Southern Pacific timely raised this federal question on appeal in its Brief of Appellant, filed December 4, 1989, with the Court of Appeals for the Fourth Supreme Judicial District of Texas.

The court's charge to the jury contained no instruction concerning the non-taxable nature of any award to Hernandez. The jury found in favor of Hernandez, and after reducing the award by the 20% contributory negligence finding, and by the two liens held against Hernandez's recovery, the net value of Respondent's judgment against Southern Pacific is $422,295.47, plus costs of court and interest.

The Texas appellate court below acknowledged that *Liepelt* was controlling and that "it was erroneous for the trial court to fail to instruct on the non-taxability of the award." 804 S.W.2d at 561. The Court considered such error to be harmless, however, stating:

In *Liepelt*, the respondent's expert witness computed the amount of pecuniary loss at $302,000 plus the value of the care and training that the decedent would have provided to his young children. The jury, however, awarded damages of $775,000. . . .

. . . .

In the case at hand, Everitt Dillman, Ph.D., *Hernandez's own expert witness*, calculated Hernandez's lost *past* earnings to be $57,915. . . . Dillman computed Hernandez's lost *future* earnings at $998,242 to age 61, assuming 100% disability, and at $1,344,515 to age 70, also assuming 100% disability. Dillman also computed lost *future* earnings at between $350,000 and $400,000, assuming an impairment rating of 35–40% and retirement at 61. . . . Dillman also calculated lost *future* earnings of $600,000 based on Hernandez's last employment prior to his employment with Southern Pacific. . . . Dillman, moreover, testified that in his calculations *he had deducted income taxes* from Hernandez's past and future wage losses. . . .

We find that the trial court's failure to grant Southern Pacific's requested instruction on the non-taxability of Hernandez's award was harmless error on the grounds that the jury was aware that Hernandez's expert witness had already deducted income taxes in calculating Hernandez's lost past and future wages and the

jury's verdict indicates that the jury did not improperly inflate the recovery since it is far less than the highest values given by the expert witness and only slightly higher than the smallest value. *See Liepelt*, 444 U.S. at 497, 100 S. Ct. at 759; *Flanigan*, 632 F.2d at 890.

Id. at 561–62.

REASONS FOR GRANTING THE PETITION

I.

The Texas appellate court's opinion is contrary to this Court's decisions in Gulf Offshore Co. v. Mobil Oil Corp., and Liepelt v. Norfolk & W. Ry., and undermines a defendant's protection from inflated jury awards.

In *Liepelt*, the administrator of a train fireman sued the railroad under the FELA for the death of the fireman. The defendant requested a cautionary instruction advising the jury of the non-taxability of any damages award. The trial court refused to give the instruction. The jury returned a verdict for the plaintiff of $775,000. 444 U.S. at 491.

This Court held that the failure to give the non-taxability instruction was reversible error,[1] stating:

> [I]t is entirely possible that the members of the jury may assume that a plaintiff's recovery in a case of this kind will be subject to federal taxation, and that the award should be increased substantially in order to be sure that the injured party is fully compensated. . . .
>
> It is surely not fanciful to suppose that the jury erroneously believed that a large portion of the award would be payable to the Federal Government in taxes, and that therefore it improperly inflated the recovery. Whether or not this speculation is accurate. . . .

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[1]In *Liepelt* this Court also addressed the issue of whether it was error to exclude evidence of the income taxes payable on the decedent's past and estimated future earnings, and concluded exclusion of the evidence was error. 444 U.S. at 494. The issue is not relevant to this case. The appellate court below, however, confused the two issues in its holding. 804 S.W.2d at 562. The two issues are distinct, and the introduction of evidence regarding the plaintiff's after-tax earnings does not affect a defendant's entitlement to the non-taxability of award instruction. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 486 (1981); see generally, Note, *"Income Taxation and the Calculation of Tort Damage Awards: The Ramifications of Norfolk & Western Railway v. Liepelt,"* 38 Wash. & Lee L. Rev. 289, 290-91 (1981). Southern Pacific was entitled to a proper instruction from the trial court regarding the non-taxable nature of any award to Hernandez. Dr. Dillman never told the jury that Hernandez would not pay taxes on the award in this case. In any event, such a statement from an interested expert witness would not discharge the trial court's responsibility to properly instruct the jury.

> We hold that it was error to refuse the requested instruction in this case.

444 U.S. at 496–98.

The facts of *Liepelt* and its rationale make clear that the court below erred and that reversible error occurs whenever a trial court refuses to instruct on the non-taxability of an award. A defendant is entitled to the instruction whether or not it is successful in making an after-the-fact showing that the jury actually inflated the size of its award because of imaginary taxes.

In *Liepelt* there was a significant discrepancy between the damages estimate provided by the plaintiff's expert witness ($302,000) and the damages awarded by the jury ($775,000). *Id.* at 497. The size of this discrepancy was critical to the court below and to the federal appellate courts supporting a restrictive reading of *Liepelt*. *Southern Pacific Transp. Co. v. Hernandez*, 804 S.W.2d at 562; *Flanigan v. Burlington Northern, Inc.*, 632 F.2d 880, 890 (8th Cir. 1980), cert. denied, 450 U.S. 921 (1981).

An examination of the lower appellate court opinion in *Liepelt*, however, reveals that the size of the discrepancy between the plaintiff's economist's estimate of damages and the jury's actual award does not control whether the non-taxability instruction is required. See also, *O'Byrne v. St. Louis S.W. Ry.*, 632 F.2d 1285, 1287 (5th Cir. 1980) (per curiam). Damage elements awarded by the trial court in *Liepelt* included non-economic factors that could not be quantified: "[t]he economist was unable to value the elements of rearing, training, instruction, advice and guidance of the decedent's children. He knew of no statistics for placing a

monetary value upon these elements." *Liepelt v. Norfolk & W. Ry.*, 378 N.E.2d 1232, 1245 (Ill. App. Ct. 1978). Surely, it would not have been "fanciful" for the *Liepelt* jury to place a larger value on these non-pecuniary damage elements than the pecuniary elements subject to the economist's calculations. Accordingly, it is not at all clear that the *Liepelt* jury inflated its award, and such speculation cannot explain this Court's decision. 444 U.S. at 497-98 ("[w]hether or not this speculation is accurate . . . [w]e hold it was error to refuse the requested instruction . . . .").

Both the majority and the dissenting opinions in *Liepelt* recognized it was impossible to determine whether the jury actually inflated the award because of a mistaken understanding of the Internal Revenue Code. 444 U.S. at 497-98, 503 (Blackmun, J., dissenting). It is likewise not possible in this case to divine what influenced the jury's determination of the size of the award and whether improper consideration of imaginary taxes played a role. There is no evidentiary or logical basis for the appellate court's conclusion that "the jury's verdict indicates that the jury did not improperly inflate the recovery...." 804 S.W.2d at 562. Contrary to the court of appeals reasoning, there is no meaningful distinction between the facts in *Liepelt* and the facts here. The apparent lack of discrepancy in this case between the economist's testimony and the jury's award does not indicate the recovery was not improperly inflated. The jury in this case was entitled to place a far lower value on plaintiff's economic damages than the values assumed by his expert witness, e.g., *Pollard v. Metropolitan Life Ins. Co.*, 598 F.2d 1284, 1288 (3rd Cir.), cert. denied, 444 U.S. 917 (1979); *United States v. Jackson*, 425 F.2d 574, 577 (D.C. Cir. 1970).

In fact, Dr. Dillman completed no individual assessment of the value of the plaintiff's lost earning capacity, but simply made calculations based on various assumptions. 804 S.W.2d at 562. Accordingly, the appellate court's conclusion that there was no discrepancy between the testimony on damages and the jury's award erroneously assumed that the economist rather than the jury would decide Hernandez's degree of impairment.[2] In view of this testimony, it is entirely possible that the jury concluded Hernandez's impairment was far less than what the economist assumed and mistakenly factored imaginary taxes into its award to arrive at the aggregate damages finding of $555,520.14.[3] This testimony and the general proposition that "few members of the public are aware of the special statutory exception for personal injury awards contained in the Internal Revenue Code," 444 U.S. at 497 [citation omitted], shows Southern Pacific was harmed by the trial court's refusal to give the non-taxability of award instruction.

Following *Liepelt*, the Fifth Circuit Court of Appeals directly addressed the issue of whether the size of the gap between the economist's damages estimate and the jury award (the amount of assumed improper jury inflation) was relevant to a finding of reversible error. The court concluded it was not, and reversed the judgment because of the failure to give the non-taxability instruction. *O'Byrne*, 632 F.2d at 1287.

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[2]The appellate court also got the facts wrong. Contrary to the court's conclusion that "Southern Pacific's expert witness [found] that Hernandez had an impairment rating of 35%-40%," *id.*, Dr. Carlos Arazosa was in fact Plaintiff's treating physician.

[3]After Plaintiff's contributory negligence of 20% and various liens were reduced from this gross amount, the net judgment against Southern Pacific is $422,295.47.

See also *In re Air Crash Disaster Near Chicago*, 803 F.2d 304, 313, 317–18 (7th Cir. 1986) (finding reversible error in denial of instruction notwithstanding conclusion that jury award was not excessive); *Fulton v. St. Louis–S.F. Ry.*, 675 F.2d 1130, 1134 (10th Cir. 1982) (finding reversible error in denial of instruction without any discussion of a discrepancy between the jury's award and the evidence on damages).

Liepelt was further clarified in *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981). *Gulf Offshore* was a personal injury action under the Outer Continental Shelf Lands Act, 43 U.S.C.A. §§ 1331 et seq. On appeal to the United States Supreme Court, one of the defendants claimed it was entitled to a jury instruction under federal law that personal injury damage awards were not subject to federal taxation.

Although the Court remanded the case to state court for a determination of Louisiana law, it accepted the argument that the defendant was entitled to a non–taxability of award instruction, even in the absence of evidence showing the effect of taxation:

> We also reject respondents' contention that we are foreclosed from deciding the issue because petitioner did not introduce any evidence about the effect of taxation on Gaedecke's future earnings. No evidentiary predicate is required to instruct a jury *not* to consider taxes.... [W]e held in *Liepelt* . . . that a defendant in an FELA case is entitled to an instruction that damages awards are not subject to federal income taxation . . . . [T]he instruction furthers strong federal policies of fairness and

> efficiency in litigation of federal claims. If Congress had been silent about the source of law in an OCSLA personal injury case, *Liepelt* would require that the instruction be given.

453 U.S. at 485 n.15, 486–87. The court of appeals' opinion in this case did not address the *Gulf Offshore* decision.

Liepelt's rationale, as well as this Court's subsequent decision in *Gulf Offshore*, compel the conclusion that reversible error occurs whenever a trial court refuses the non-taxability instruction. In effect, *Liepelt* and *Gulf Offshore* establish a *per se* rule that reversible error occurs whenever a trial court refuses to instruct the jury that damages awards are non-taxable. Any rule other than a requirement that the instruction be given in all cases will lead appellate courts to speculate about the jury's collective mental process in arriving at a particular figure.[4] The *per se* rule is superior in ease of application and in insuring that defendants are not subject to improperly inflated damages awards. Such a rule was explicitly adopted by the Fifth Circuit in *O'Byrne* and implicitly endorsed by the Seventh Circuit in *Air Crash Disaster* and by the Tenth Circuit in *Fulton*. In contrast, only the Eighth Circuit supports the harmless error rule adopted in this case.

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[4]As a general rule, Fed. R. Ev. 606(b) prohibits post-verdict inquiry into the jury's deliberations. In other contexts this Court has recognized the strong policy considerations against making such inquiries. E.g., *Tanner v. United States*, 483 U.S. 107 (1987). Accordingly, courts should not be encouraged to speculate about the possible influences on a jury's deliberations to impeach a verdict.

Under the Texas court of appeals' reasoning, as well as the reasoning in *Flanigan*, a defendant will be entitled to reversal on appeal for refusal of the non-taxability instruction only where the actual jury award was larger than the highest damage estimates supplied by plaintiff's expert witness. See *Hernandez*, 804 S.W.2d at 562. In all other cases, failure to give the non-taxability instruction would be harmless error even if the award had been improperly inflated by the jury.

Unless this Court corrects the error committed by the court below, defendants in actions decided under federal common law will face anew the dangers of inflated jury awards which this Court attempted to minimize in *Liepelt*. See 444 U.S. at 496-97.

This Court should re-affirm its holding in *Liepelt* for the same reasons *Liepelt* was originally decided:

> "[t]o put the matter simply, giving the instruction can do no harm, and it can certainly help by preventing the jury from inflating the award and thus over-compensating the plaintiff on the basis of an erroneous assumption that the judgment will be taxable."

Id. at 498 (alteration in original) (quoting *Burlington Northern, Inc. v. Boxberger*, 529 F.2d 284, 297 (9th Cir. 1975)).

II.

The Texas appellate court's holding that failure to instruct the jury regarding the non-taxability of a personal injury damage award was harmless error addresses an issue of national significance upon which the United States Courts of Appeals are in conflict.

In *Norfolk & W. Ry. v. Liepelt*, 444 U.S. 490 (1980), this Court decided that a defendant in an FELA case was entitled to a cautionary jury instruction that damage awards were not subject to income taxation and that taxes should not be considered by the jury in reaching its verdict. *Id.* at 498.

Since the FELA afforded no guidance on the issue, the court articulated a federal common-law rule of general applicability. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 486-87 & n. 17 (1981). Accordingly, the issue presented by this Petition has significance far beyond the FELA and the immediate parties to this litigation, and transcends the "academic or the episodic." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955).

Liepelt has been followed by numerous courts in resolving a variety of federal claims. The non-taxability instruction is required in actions brought under the Jones Act, e.g., *Nesmith v. Texaco, Inc.*, 491 F. Supp. 561, 563 (W.D. La. 1980), modified in part per curiam on other grounds, 727 F.2d 497 (5th Cir. 1984), cert. denied, 469 U.S. 855 (1984); in actions brought under the Death on the High Seas Act, e.g. *Solomon v. Warren*, 540 F.2d 777, 788 n.12 (5th Cir. 1976), cert. dismissed sub nom. *Warren v. Serody*, 434 U.S. 801 (1977); *National Airlines, Inc. v. Stiles*, 268 F.2d 400, 403-04

n.4 (5th Cir.), cert. denied, 361 U.S. 885 (1959); and is arguably required in actions brought under 42 U.S.C.A. § 1983 unless the award only involves back pay, which is considered taxable. See generally, Note, *"Income Taxation and the Calculation of Tort Damage Awards: The Ramifications of Norfolk & Western Railway v. Liepelt,"* 38 Wash & Lee L. Rev. 289, 301 (1981).[5]

The appellate court below acknowledged a conflict in the federal circuits with regard to the question of whether a defendant is automatically entitled to a non-taxability of award instruction. Rather than following controlling precedent from the Fifth Circuit Court of Appeals, however, the Texas court followed authority from the Eighth Circuit Court of Appeals because it deemed this authority "more persuasive." 804 S.W.2d at 561, comparing *O'Byrne v. St. Louis S.W. Ry.*, 632 F.2d 1285, 1287 (5th Cir. 1980) ("*Liepelt* did not require the demonstration of an erroneously inflated award in order to find reversible error in the denial of the requested [non-taxability of award] instruction") and *Lang v.*

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[5]A survey of reported decisions relating to these statutes provides some indication of the significance of the issue presented here. A WESTLAW search for calendar year 1990 revealed 246 state and federal cases which referred to the FELA; 132 cases which referred to the Jones Act; 26 cases which referred to the Death on the High Seas Act, and 4,648 cases which referred to 42 U.S.C.A. § 1983. Official statistics published by the Administrative Office of the United States Courts reflect that in the twelve-month period between June 30, 1989, and June 30, 1990, 2,741 FELA cases were commenced in the federal district courts, as well as 2,961 marine personal injury actions, and almost 45,000 actions claiming federal civil rights violations. 1990 Annual Report of the Director of the Administrative Office of the United States Courts (Appendix 1 at pp. 32-33). Petitioner obviously has not reviewed these cases, and only suggests that this raw data provides some indication of the significance of the issue raised.

Texas & P. Ry., 624 F.2d 1275, 1280 (5th Cir. 1980) (applying *Liepelt* retroactively in holding that failure to give instruction was reversible error) with *Flanigan v. Burlington Northern, Inc.*, 632 F.2d 880, 890 (8th Cir. 1980), cert denied, 450 U.S. 921 (1981) (defendant must show evidence that jury in fact operated under false impression of tax laws for failure to give instruction to constitute reversible error).

In rejecting the rule in the Fifth Circuit, the court below also failed to acknowledge *In re Air Crash Disaster Near Chicago*, 803 F.2d 304, 313 (7th Cir. 1986), which relied on *Liepelt* and *Gulf Offshore* in ruling that the non-taxability instruction was required "as a matter of generally applicable federal common law." In *Fulton v. St. Louis-S.F. Ry.*, 675 F.2d 1130, 1134 (10th Cir. 1982), the Tenth Circuit Court of Appeals also followed *Liepelt* and reversed a jury's verdict in an FELA case for failure of the trial court to instruct on the non-taxability issue.

A conflict between the federal courts of appeal on an issue of federal law is an important reason for this Court to grant a petition for writ of certiorari. E.g., *Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694, 700 (1982); *Marks v. United States*, 430 U.S. 188, 189 (1977). The conflict presented in this case is more than the garden variety inter-circuit dispute, however. If left undisturbed, the Texas appellate court's decision will create a conflict of law between federal district courts sitting in Texas and Texas state courts. Such inter-system conflicts strike at the heart of the *Erie* doctrine. *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 204 (1956) ("The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a nonresident litigant in a federal court instead of in a state court a block away should not lead to a substantially

different result.") (citation omitted). See also, Hill, *Substance and Procedure in State FELA Actions--The Converse of the Erie Problem?*, 17 Ohio St. L.J. 384, 386-87 (1956).

In addition to these jurisprudential concerns, the conflict in issue undermines the goal of uniformity in the interpretation or federal law, which is particularly applicable to the FELA since the state and federal courts have concurrent jurisdiction. This Court recognized in *Liepelt* that one purpose of the FELA was "to create uniformity throughout the Union with respect to railroads' financial responsibility for injuries to their employees." 444 U.S. at 493 n.5 (citation omitted). See also, *Brown v. Western Ry. of Alabama*, 338 U.S. 294, 298-99 (1949) (uniformity in adjudication of federally created rights is desirable).

CONCLUSION

The petition for a writ of certiorari should be granted to resolve a conflict between the courts of appeal, and to preserve the right of defendants in cases governed by federal law to be free from inflated jury awards based upon speculation that such awards may be taxable.

Respectfully submitted,

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LEO D. FIGUEROA
ROBERT SHAW-MEADOW
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August 1991

APPENDIX

APPENDIX A

COURT OF APPEALS
FOURTH COURT OF APPEALS
DISTRICT OF TEXAS
SAN ANTONIO
JUDGMENT

Appeal No. 04-89-00554-CV

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Appellant,
versus
JOSE HERNANDEZ,
Appellee.

OPINION

Appeal from the 293rd District Court of Maverick County
Trial Court No. 8758
Honorable Rey Perez, Judge Presiding

Opinion by: Ron Carr, Justice

Sitting: Shirley W. Butts, Justice
Alfonso Chapa, Justice
Ron Carr, Justice

Delivered and Filed: January 16, 1991

AFFIRMED

This is an appeal from a judgment rendered after an adverse jury verdict in a suit brought pursuant to the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51–60 (1986). Appellee, Jose Hernandez, filed suit against Southern Pacific Transportation Company (Southern Pacific), alleging that while employed by Southern Pacific, he sustained injuries and incurred damages caused by Southern Pacific's negligence. The court entered a judgment in favor of Hernandez in the amount of $444,416.11 plus post–judgment interest and costs of court.

This appeal presents us with the following issues: (1) whether Southern Pacific is entitled to a new trial because it could not secure a complete and proper record of the trial; (2) whether the court's refusal to include a jury instruction on the non–taxability of the award amounted to reversible error; (3) whether there is no evidence that Hernandez was injured while employed in interstate commerce; (4) whether the trial court committed reversible error by refusing to give the jury Southern Pacific's requested instruction regarding mitigation of damages; and (5) whether the trial court erred in reducing Hernandez's award by the 20% contributory negligence finding. We affirm.

In the first point of error, Southern Pacific argues that it is entitled to a new trial because a complete and proper record of the trial cannot be secured. Under this point of error, Southern Pacific argues that two significant parts of the record are missing: (1) an expert witness's deposition testimony which was read into the record but not included in the statement of facts, and (2) the *original* "Defendant's Requested Questions and Instructions."

Southern Pacific asserts in its brief, and Hernandez does not dispute, that on the morning of May 24, 1989, the official court reporter, Jerry Parmer, was absent for the commencement of testimony. In Parmer's absence, the presiding judge, the Honorable Rey Perez, requested and authorized Lisa Edwards, a deputy reporter, to make a full record of the evidence. Rule 11 of the Texas Rules of Appellate Procedure provides that the presiding judge of the court may authorize a deputy reporter to act in place and perform the duties of the official reporter. TEX. R. APP. P. 11(c). Those duties include making a full record of the evidence when requested by the judge or any party to a case. TEX. R. APP. P. 11(a).

Deputy Reporter Edwards proceeded to record the oral testimony and evidence on May 24 and 25, 1989. A. R. Nering, M.D., who examined Hernandez, testified by deposition regarding Hernandez's physical condition at the time of the examination and the prognosis for recovery.

In Volume III[1] of the statement of facts, which was prepared and certified by Edwards, the part concerning Dr. Nering's testimony reads as follows:

> Mr. Figueroa: Your Honor, at this time, we would call A. R. Nearing, M.D. [sic], by deposition. For the record, Your Honor, Dr. Nearing's [sic] deposition was taken on

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[1]The labeling of this volume as "Volume III" is a misnomer. The official court reporter, Jerry D. Parmer, had transcribed testimony into three volumes which he labeled Volume 1, Volume 2, and Volume 3. Edward's volume, therefore, is actually the fourth volume of the statement of facts.

> Tuesday, March 15, 1988, at 2:00 p.m. at his office in El Paso.
>
> A. R. Nearing, M.D., [sic] sworn by the court reporter testified as follows: and these are questions by Howard Newton, my partner. Beginning on page 2, line 19:
>
> > (Whereupon, Mr. Figueroa and Mr. Walker read the oral deposition of A. R. Nearing, M.D. [sic])
>
> Mr. Figueroa: That concludes our offer of this deposition, your Honor.

In its brief, Southern Pacific's attorney contends that he first learned of the omission of Dr. Nering's deposition testimony from the statement of facts when reading the volume prepared by Edwards; that he contacted Hoffman Reporting Service, for whom Edwards worked, but learned that Edwards had moved to Italy and was no longer with that reporting service; and that Hoffman Reporting Service also informed him that they could not locate any recording made by Edwards which was not already transcribed in the volume of the statement of facts Edwards prepared.

On appeal, Southern Pacific filed a "Motion for Amendment of the Record" pursuant to Rule 55 of the Texas Rules of Appellate Procedure. That rule provides for different methods to correct inaccuracies in the transcript or statement of facts. TEX. R. APP. P. 55. This court granted Southern Pacific's "Motion for Amendment of the Record" and added "Exhibit D-3," the oral deposition of A. R.

Nering, M.D., to the formal record of this case. Appellee Hernandez, moreover, did not disagree to the addition of the deposition to the record.

The entire deposition of Dr. Nering, which had been read at trial but not included in the statement of facts, is now part of the formal record before this court. A new trial record has not been created; the appellate record has simply been corrected. *See Gerdes v. Marion State Bank*, 774 S.W.2d 63, 65 (Tex. App.--San Antonio 1989, writ denied) ("Rule 55 authorizes trial judges and appellate courts to correct the *appellate* record on their own initiative, or at the request of counsel; it does not allow the creation of a new trial court record."). We find, therefore, that the record before us is complete and that this complaint under point of error one is moot.

Southern Pacific also contends under this point of error that since the original "Defendant's Requested Questions and Instructions" is not part of the record, the record on appeal is incomplete, and therefore, Southern Pacific is unable, through no fault of its own, to show that error was properly preserved.

In its brief Southern Pacific asserts, and the record supports, that a file-stamped copy of "Defendant's Requested Questions and Instructions" appears in the transcript on appeal. In October 1989, Diamantina Trevino, District Clerk of Maverick County, contacted Southern Pacific and informed Southern Pacific that its requested questions and instructions were not in the court's files. The clerk then requested Southern Pacific's counsel to provide a copy of the part of the transcript entitled "Defendant's Requested Questions and Instructions" to serve as a substitute for the record. Southern

Pacific's counsel responded by providing copies of the issues and instructions, and these were file-stamped and substituted into the record by District Clerk Trevino.

Southern Pacific and Hernandez have stipulated that requested instruction 19 (which is made the basis of point of error 2) and requested instruction 20 (which is made the basis of point of error 4) were both submitted to the trial court in the same form as they appear in the transcript. Both parties stipulate, moreover, that the trial judge refused instructions 19 and 20 and endorsed each of those instructions with his signature and the word "refused." The stipulation is supported by the statement of facts, which reflects that the judge refused requested instructions 19 and 20.

Rule 50(e) of the Texas Rules of Appellate Procedure provides that "[w]hen the record or any portion thereof is lost or destroyed it may be substituted in the trial court and when so substituted the record may be prepared and transmitted to the appellate court as in other cases." TEX. R. APP. P. 50(e). In the case at bar, there has been a proper substitution, and Hernandez does not challenge the substitution on appeal. We find, therefore, that Southern Pacific has failed to show how it is harmed by not having the original. TEX. R. APP. P. 81(b).

Southern Pacific's first point of error is overruled.

In the second point of error, Southern Pacific argues that the court's refusal to include a jury instruction on the non-taxability of an award amounted to reversible error.

The leading case regarding this issue is *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490, 100 S. Ct. 755, 62

L. Ed. 2d 689 (1980). In *Liepelt*, the administrator of the estate of a freight train fireman brought an action to recover against the railroad under FELA for the death of the fireman. The case was originally heard in an Illinois state court but ultimately was appealed to the U.S. Supreme Court. The Supreme Court found that it was error for the trial court to have refused the requested instruction regarding the non-taxability of the award. In *Liepelt*, the respondent's expert witness computed the amount of pecuniary loss at $302,000 plus the value of the care and training that the decedent would have provided to his young children. The jury, however, awarded damages of $775,000. The Supreme Court found that "[i]t is surely not fanciful to suppose that the jury erroneously believed that a large portion of the award would be payable to the Federal Government in taxes, and that therefore it improperly inflated the recovery." 444 U.S. at 497, 100 S. Ct. at 759. The Court reversed the judgment and remanded the case for further proceedings not inconsistent with its opinion.

We follow *Liepelt* and find that it was erroneous for the trial court to fail to instruct on the non-taxability of the award. 444 U.S. at 498, 100 S. Ct. at 759; *see also Flanigan vs. Burlington Northern Inc.*, 632 F.2d 880, 889 (8th Cir. 1980), *cert. denied*, 450 U.S. 921, 101 S. Ct. 1370, 67 L. Ed. 2d 349 (1981). Our inquiry, however, does not end here. *See Flanigan*, 632 F.2d at 889.

Appellant relies on two Fifth Circuit cases, *O'Byrne v. St. Louis Southwestern Ry. Co.*, 632 F.2d 1285 (5th Cir. 1980), and *Lang v. Texas & Pacific Ry. Co*, 624 F.2d 1275 (5th Cir. 1980), to argue that *Liepelt* requires an automatic finding of reversible error if a requested jury instruction regarding taxability of an award is refused by the trial court.

In *O'Byrne*, the Fifth Circuit found unpersuasive the argument that the failure to give the requested instruction was harmless error. 632 F.2d at 1286. In *Lang*, the Fifth Circuit, citing *Liepelt*, found that the trial court had erred by refusing to give the proffered charge concerning taxability. 624 F.2d at 1280. We, however, do not find these Fifth Circuit cases persuasive.

We find *Flanigan v. Burlington Northern Inc.*, 632 F.2d 880, 889 (8th Cir. 1980), *cert. denied*, 450 U.S. 921, 101 S. Ct. 1370, 67 L. Ed. 2d 349 (1981), more persuasive than *Lang* and *O'Byrne*. In *Flanigan*, the Eighth Circuit, in an opinion whose writ for certiorari was denied by the U.S. Supreme Court, held that *Liepelt* did not require automatic reversal if a jury instruction regarding non-taxability of the award was denied. The *Flanigan* court applied a harmless error test. 632 F.2d at 889. In Texas, morever,

> [n]o judgment shall be reversed on appeal and a new trial ordered in any cause on the ground that the trial court has committed an error of law in the course of the trial, unless the appellate court shall be of the opinion that the error complained of amounted to such a denial of the rights of the appellant as was reasonably calculated to cause and probably did cause rendition of an improper judgment in the case. . . .

TEX. R. APP. P. 81(b)(1). We find that the trial court's failure to include Southern Pacific's requested instruction on the nontaxability of Hernandez's award did not cause the rendition of an improper verdict for the reasons provided below.

In the case at hand, Everitt Dillman, Ph.D., *Hernandez's own expert witness*, calculated Hernandez's lost *past* earnings to be $57,915. To calculate Hernandez lost *future* earnings, Dillman used several methods. Dillman computed Hernandez's lost *future* earnings at $998,242 to age 61, assuming 100% disability, and at $1,344,515 to age 70, also assuming 100% disability. Dillman also computed lost *future* earnings at between $350,000 and $400,000 assuming an impairment rating of 35–40% and retirement at 61. This last calculation was based on the finding of Dr. Carlos Arazosa, Southern Pacific's expert witness, that Hernandez had an impairment rating of 35–40%. Dillman also calculated lost *future* earnings of $600,000 based on Hernandez's last employment prior to his employment with Southern Pacific, which was as a clerk earning $6.00 per hour. Dillman, moreover, testified that in his calculations *he had deducted income taxes* from Hernandez's past and future wage losses. The court entered judgment in favor of Hernandez in the amount of $444,416.11 plus post-judgment interest and costs of court.

We find that the trial court's failure to grant Southern Pacific's requested instruction on the non-taxability of Hernandez's award was harmless error on the grounds that the jury was aware that Hernandez's expert witness had already deducted income taxes in calculating Hernandez's lost past and future wages and the jury's verdict indicates that the jury did not improperly inflate the recovery since it is far less than the highest values given by the expert witness and only slightly higher than the smallest value. *See Liepelt*, 444 U.S. at 497, 100 S. Ct. at 759; *Flanigan*, 632 F.2d at 890.

Southern Pacific's second point of error is overruled.

In the third point of error, Southern Pacific argues that the trial court erred in entering judgment against it because there was no evidence that Hernandez was injured while employed in interstate commerce as required by FELA:

> Every common carrier by railroad while engaging in commerce between . . . any of the States or Territories . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

45 U.S.C. § 51 (1986).

In addressing a no evidence point, the court considers only the evidence and inferences tending to support the

finding and disregards all evidence and inferences to the contrary. *Sherman v. First Nat'l Bank*, 760 S.W.2d 240, 242 (Tex. 1988). In the case at hand, we must determine whether there is some evidence to support the jury's finding that Hernandez was injured while employed in interstate commerce. *Id.* After reviewing the entire record, we find that there is some evidence to support the jury's finding that Hernandez was injured while employed in interstate commerce.

In a request for admissions, Southern Pacific admitted that it is a railroad; that it was engaged in interstate commerce on the date of the injury; and that Hernandez was in the course and scope of his employment for Southern Pacific at the time of his injury. We find that Southern Pacific's admissions conclusively show that Southern Pacific's argument is without merit. Southern Pacific's third point of error is overruled.

In the fourth point of error, Southern Pacific argues that the trial court erred in refusing to give the jury Southern Pacific's requested instruction regarding mitigation of damages.

Federal law generally governs the substantive rights of the parties in FELA cases, but when such cases are filed in state courts, they are tried in accordance with the state's own applicable rules of civil procedure. *Dutton v. Southern Pacific Transp.*, 576 S.W.2d 782, 783–84 (Tex. 1978). In Texas, a court has considerable discretion to submit issues to a jury, and absent a showing of the denial of the rights of appellant as was reasonably calculated to cause and probably did cause the rendition of an improper judgment in the case, there is no abuse of discretion by the trial judge. *Green Tree*

Acceptance, Inc. v. Combs, 745 S.W.2d 87, 89 (Tex. App.--San Antonio 1988, writ denied); TEX. R. CIV. P. 273.

In *Atchison, Topeka & Santa Fe Ry. Co. v. O'Merry*, 727 S.W.2d 596, 600-01 (Tex. App.--Houston [1st Dist.] 1987, no writ), a FELA case, the court evaluated a requested instruction identical to the one Southern Pacific requested here:

> In connection with Question Nos. ____ and ____, you are instructed that an injured party is under a legal obligation to mitigate his damages, that is, to minimize the economic loss resulting from his injury by taking reasonable steps to assist in effecting a healing of his injury and by resuming gainful employment as soon as such can reasonably be done. And if he fails to take reasonable steps to assist in effecting a healing of his injury so as to enable him to return to work, or if he does not resume and continue available employment even though he is physically able to do so, such person may not recover damages incurred after the date on which he was or reasonably could have been able to return to some form of gainful employment.

See O'Merry, 727 S.W.2d at 600. The court in *O'Merry*, in expressly rejecting the use of the identical requested instruction, ruled that "[t]he trial court must give definitions of legal and other technical terms, but is not required to give other instructions if they do not aid the jury." 727 S.W.2d at 601. It further held that since the specific instruction would not have been helpful to the jury, the trial court did not abuse

its discretion in refusing to submit the requested instruction. *Id.*

Applying *O'Merry*, we hold that the trial court in this case did not abuse its discretion in refusing to submit the requested instruction on mitigation of damages. Southern Pacific, moreover, has failed to show that it was harmed by the refusal to include the instruction.

The fourth point of error is overruled.

In a sole cross point, appellee Hernandez argues that if he failed to prove the interstate commerce activity which would bring this case within FELA, the trial court erred in reducing his award by the 20% contributory negligence finding. Section 3 of FELA provides that "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee . . . ." 45 U.S.C. § 53 (1986). We find, however, that Hernandez did prove the interstate commerce activity which would bring this case properly within FELA. The court, therefore, did not err in reducing Hernandez's award by 20% since the jury found that 20% of the negligence was attributable to Hernandez. The cross point is overruled.

The judgment is AFFIRMED.

RON CARR
Justice

PUBLISH.

APPENDIX B

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

May 23, 1991

Mr. Howard P. Newton
Matthews & Branscomb
800 One Alamo Center
106 S. St. Mary's Street
San Antonio, TX 78205

Mr. Leo D. Figueroa
Matthews & Branscomb
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Mr. Robert Shaw-Meadow
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One Alamo Center, Suite 800
106 S. St. Mary's Street
San Antonio, TX 78205

Mr. John A. Carwile
Steinburg & Bryant
1301 McKinney, Suite 3600
Houston, TX 77010-3090

RE: Case No. D-1003

Style: SOUTHERN PACIFIC TRANSPORTATION COMPANY v. JOSE HERNANDEZ

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation, "Writ Denied."

Sincerely,

JOHN T. ADAMS, Clerk

by:_____
Courtland Crocker, Deputy

APPENDIX C

OFFICIAL NOTICE
COURT OF APPEALS
4th COURT OF APPEALS DISTRICT

March 6, 1991

RE: Case No. 04-89-00554-CV

Style: Southern Pacific Transportation Co.
v. Jose Hernandez

After examination of the record in the above styled and numbered cause the Court DENIES Appellant's Motion for Rehearing.

ORDERED the day and year first above written.

Trial Court Case No. 8758 *HERB SCHAEFER, CLERK*

APPENDIX D

COURT OF APPEALS
FOURTH COURT OF APPEALS
DISTRICT OF TEXAS
SAN ANTONIO
JUDGMENT

Appeal No. 04-89-00554-CV

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Appellant,
v.
JOSE HERNANDEZ,
Appellee

Appeal from the 293rd District Court of Maverick County
Trial Court No. 8758
Honorable Rey Perez, Judge Presiding

BEFORE JUSTICES BUTTS, CHAPA, AND CARR

J U D G M E N T

In accordance with this Court's opinion of this date, the judgment of the trial court is AFFIRMED. It is ORDERED that appellee Jose Hernandez recover his costs of this appeal and the full amount of the trial court's judgment from appellant Southern Pacific Transportation Company, from National Surety Corporation as surety on appellant's cost

bond, and from Continental Casualty Company as surety on appellant's supersedeas bond.

SIGNED January 9, 1991.

RON CARR
JUSTICE

APPENDIX E

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely

and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.